fifth defendants, counsel for the defendants submitted at the hearing that it stood or fell dependent upon the validity of the lease agreement. In the view I take of the validity of the latter, the defences of these defendants must therefore fail.

Having heard submissions by counsel and having considered the pleadings and the evidence adduced by the parties, I am satisfied that the defendants have failed to set up any *bona fide* defence or raise any issue or question which ought to be tried or show that there ought for some other reason to be a trial. There will be judgment for the plaintiffs against all the defendants in this action in the sum of $1,264,130.83 with interest at 8% per annum from to-day until payment and costs. In the absence of an agreement between the parties, the costs are to be taxed.

Order accordingly.

Solicitors: *Tiong Lim & Wong Co., Hii & Co.*

UNITED MALAYAN BANKING CORPN. BHD. v. SYARIKAT PERUMAHAN LUNAS SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) January 15, 1988]

[Penang – Originating Summons No. 31-855-86]

Civil Procedure – Application to set aside ex parte order – Order of sale of land – Whether court was functus officio once order of sale was perfected – R.H.C. 1980, O. 28 r.4(1), O. 32 r. 5(3) – Courts of Judicature Act 1964, s. 68(2).

This was a defendant's application by way of summons-in-chambers to set aside an order of sale of certain land which is the subject matter of a charge executed by the defendant in favour of the plaintiff by way of security for an overdraft facility. A preliminary objection was raised by counsel for the plaintiff that the court was *functus officio* once the order of sale was perfected.

Held: (1) for the reasons urged by counsel for the defendant, the court had no hesitation in overruling the preliminary objection;

(2) the court did not consider that Order 32 rule 5(3) of the Rules of the High Court 1980 had any relevance to the issue which arose before the court because the court was not concerned here with an application to re-hear a summons but an application to revoke an *ex parte* order. Nor, for that matter, did the court consider the case of *Hamzah bin Abdul Majid and Anor.* v. *Sungei Way Leasing Sdn. Bhd.*(3) of any relevance because there the decision in question was one arrived at after an *inter partes* hearing so that Order 28 rule 4(1) was without application;

(3) in the circumstances, the court directed that the hearing of the application should proceed on the merits.

Cases referred to:

(1) *United Overseas Bank Limited* v. *Chung Khiaw Bank Limited* [1968] 2 M.L.J. 85 (consd and apprvd).

(2) *Craig* v. *Kanseem* [1943] 1 All E.R. 108 at 113 (consd and apprvd).

(3) *Hamzah bin Abdul Majid and Anor.* v. *Sungei Way Leasing Sdn. Bhd.* [1986] 1 M.L.J. 471 (distd).

ORIGINATING SUMMONS.

K. Balasundram for plaintiff.

N. G. Sivanandan (*Dominic Y. H. Lai* with him) for defendant.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was a defendant's application by way of summons-in-chambers to set aside an order of sale of certain land comprised in Lot 40(2) Section 14, Bandar Georgetown, Penang, N.E.D., Penang, the subject matter of a charge bearing Presentation No. 15364/83 Vol. 285, Folio 156 executed by the defendant in favour of the plaintiff by way of security for an overdraft facility upon the following grounds:

(i) that Charge Presentation No. 15364/83 Vol. 285, Folio 156 over Lot No. 40(2), Section 14, Bandar Georgetown, Penang, N.E.D., Penang is void by reason that at the time of the creation and/or execution thereof by the defendants on February 11, 1983 the defendants were not the proprietors of the said Lot No. 40(2) and in the circumstances did not have the legal capacity to create and/or execute the said charge; and/or

(ii) that on February 11, 1983, the said Lot No. 40(2) was held under Leasehold Document of Qualified Title No. H.S. (D) 19, Section 14, Bandar Georgetown, N.E.D., Penang with a restriction in interest preventing the charging of the said land without the written sanction of the state authority and that such written sanction at the material time had not been had and obtained; and/or

(iii) that the provision of section 257(2) of the National Land Code have not been complied with in that the court has not directed that the different lots be offered for sale individually and in a specified order and also that in the

event of the price fetched by one or more of them exceeds the amount specified in the order, the other or others shall be withdrawn from the sale and shall cease to be subject to the order.

At the outset of the hearing, earlier today, counsel for the plaintiff took the preliminary objection that the court was *functus officio* once the order of sale was perfected and so the defendant's remedy was by way of appeal. Accordingly, it was submitted that in order to appeal, the defendant had to comply with the formalities prescribed by section 68(2) of the Court of Judicature Act 1964, which provides that:

"No appeal shall lie from an order made by a judge of the High Court in chambers unless the judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a judge of the High Court."

But, said counsel, the order of sale having been made on July 9, 1987, the defendant not having complied with the formalities prescribed by section 68(2) and the period of appeal of one month limited under rule 56 of the Rules of the Supreme Court 1980 having expired, the defendant's remedy was to apply to the Supreme Court for extension of time to appeal and for leave.

In reply, counsel for the defendant contended that an order made on an originating summons, even though duly served on a defendant, who fails to enter an appearance and is absent at the hearing is, nevertheless, an *ex parte* order. My attention was drawn to the Singapore Court of Appeal case of *United Overseas Bank Ltd.* v. *Chung Khiaw Bank Ltd.*[1] where Chua J., delivering the judgment of the court, said this:

"The first question for consideration is whether or not the order made on the originating summons was an *ex parte* order and comes within Order LIII rule 4(1).

The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case Order LI rule 16 provides:

'Where any party who had been duly served fails to attend at the time appointed for the hearing, the judge may proceed *ex parte*, if he thinks it expedient to do so, and may require such evidence of service as he thinks fit.'

It is clear then that a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of Order LIII rule 4(1)."

Order LIII rule 4(1) of the Singapore Rules of the Supreme Court, then in force, was as follows:

"Any order made *ex parte* may be varied or set aside on application, by any person affected by it, to a judge, on such terms as to costs or otherwise as to the judge seems fit."

The relevant Singapore rule would thus seem to be generally *in pari materia* with Order 28 rule 4(1) of our Rules of the High Court 1980, which provides:

"The court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the court on such terms as it thinks just."

On this basis, it was argued that the defendant's application was perfectly competent and the court was not *functus officio* but had full powers to vary or revoke the order of sale if it deemed fit to do so having regard to the provisions of Order 28 rule 4(1) of the Rules of the High Court 1980.

In any event, it was argued that when, as here, the defendant was contending that the order of sale was a nullity, the court could, in the exercise of its inherent jurisdiction, set aside its own order and an appeal was therefore unnecessary. In support of this latter proposition the following passage in the judgment of Greene M.R. in *Craig* v. *Kanseem*[2] was cited to me:

"... Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent."

For the reasons urged by counsel for the defendant, I had no hesitation in overruling the preliminary objection.

I might as well add that I did not consider that Order 32 rule 5(3) of the Rules of the High Court 1980, which provides:

"Where the court hearing a summons proceeded in the absence of a party, then, provided that any order made on the hearing has not been perfected, the court, if satisfied that it is just to do so, may re-hear the summons",

and relied upon by counsel for the plaintiff, had any relevance to the issue which arose before me because I was *not* concerned here with an application *to re-hear* a summons but an application *to revoke an ex parte order.* Nor, for that matter, did I consider the case of *Hamzah bin Abdul Majid and Anor.* v. *Sungei Way Leasing Sdn. Bhd.*[3] of any relevance because there the decision in question was one arrived at after an *inter partes* hearing so that Order 28 rule 4(1) was without application.

In the circumstances, I directed that the hearing of the application should proceed on the merits.

Order accordingly.

Solicitors: *Balasundram & Co.; Presgrave & Matthews.*

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